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December 20, 2004

Via ECFS

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: BellSouth Petition for Forbearance, WC Docket No. 04-405

Dear Secretary Dortch:

Attached for filing are the comments of Sonic.net in the above referenced docket. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kristopher E. Twomey', with a stylized flourish at the end.

Kristopher E. Twomey
Counsel to Sonic.net

Enclosures

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	WC Docket No. 04-405
For Forbearance Under 47 U.S.C. § 160(c) From)	
Application of <i>Computer Inquiry</i> and Title II)	
Common-Carriage Requirements)	

SUMMARY

BellSouth makes the astounding proposition that by effectively granting them a monopoly, this will increase competition, spur broadband deployment, and benefit consumers. Normally, such preposterous statements can be shrugged off as yet another example of incumbent local exchange carriers (ILECs) demanding that their traditional right to monopoly be restored. But this Petition is different in the sheer magnitude of what BellSouth is proposing. Line-sharing has been eliminated, ILECs have a monopoly on new fiber networks, and now this Petition asks for the final piece of the broadband puzzle. Make no mistake; the real goal of this Petition is to destroy the independent Internet service provider industry. That would all but ensure the ILECs' control all VoIP traffic on "their" broadband network. Even though BellSouth controls over 90% of the DSL market in its local territory,¹ as is the case with most other ILECs as well, BellSouth is asking the Commission to give it the final nails to pound into the coffin of the ISP industry. And they have the nerve to argue that this would foster competition and benefit consumers. This Petition should be summarily denied and, in fact, should spur the Enforcement Bureau to initiate an immediate independent review of the wholesale versus retail price in the DSL market.

¹ "'The change would not reduce competition,' Curtin says, 'because more than 90 percent of DSL users in BellSouth's area are BellSouth retail customers and only 10 percent are served by other ISPs.'" Charlotte Wolter, *BellSouth Petition a Threat to VoIP, Says Pulver*, XChange Magazine, November 19, 2004, available at <http://www.x-changemag.com/hotnews/4bh19114724.html>. The real question here is, how did the FCC allow this to happen?

I. INTRODUCTION

Sonic.net is an independent Internet service provider located in Santa Rosa, California. Sonic.net is one of the leading independent ISPs in California with over 35,000 customers, more than 10,000 of those being DSL customers. Sonic purchases digital subscriber line transport (“DSL transport”)² from SBC Communications. Sonic.net maintains its own state of the art network operations center in Santa Rosa in a 36,000 square foot facility and has seventy employees. Sonic.net is connected via multiple dual-entrance SONET OC-12 fiber rings, as well as by a gigabit fiber connection from a major metropolitan carrier. Upstream bandwidth is routed between multiple Tier 1 and Tier 2 transit providers, including UUNet, Cable & Wireless, Layer42 and UnitedLayer, as well as multiple peering points within their network. The providers are served by three different Sonic.net POP locations. These locations in San Francisco and San Jose are provisioned with different fiber carriers. The network is designed so that there is no single point of failure. Multiple backbone routers maintain dual connections to the network core, preventing equipment failure from affecting service. Customers can uplink to multiple distribution switches to provide end-to-end path and equipment redundancy.³ Simply put, Sonic.net is a real company, with real equipment, real employees, and real customers.

The *Computer Inquiry* rules are the regulatory underpinning responsible for the initial growth in the United States Internet market. Title II common carriage requirements currently allow for the only competition in the DSL market. BellSouth argues that neither of these regimes is necessary any longer, and both are actively bad for consumers. Truth is, these requirements are only bad for BellSouth and other ILECs because they are the final obstacle in place before the ILECs can complete their monopolization of the DSL market. If ISPs are forced to order DSL transport at prices and with terms and conditions that the ILECs think are justified, you can be sure that these prices will be set at an uneconomical price. This will drive out even the 10 percent competition that

² DSL service is comprised of a combination of many inputs. The most vital is DSL Transport, an ISP’s connection between its end user customers and the Internet, which is a telecommunications service purchased from ILECs. To provide DSL-based Internet service to end users, ISPs utilize their own facilities to provide Internet access, email connectivity, instant messaging, online gaming, virtual private networks, and many other applications and services.

³ More information about Sonic.net’s datacenter can be found here:
<http://www.Sonic.net.net/whatsnew/pingzine/dcdSONIC.NET.pdf>.

struggles to exist. The end result will be the demise of independent ISPs and the creation of a broadband duopoly.

II. Two Separate Issues Are At Stake Here

A. BellSouth Unnecessarily Demanding Elimination of Tariffed Offering

Essentially in its request for forbearance in the *Computer Inquiry* rules, BellSouth is asking the Commission to save it from the trouble of tariffing DSL transport and related services. Sonic.net argues that BellSouth has not made a sufficient showing for why they are entitled to forbearance relief on this issue.

BellSouth argues that the cost of complying with Computer Inquiry rules is \$28.5 million. Sounds like a lot of money to most people. This is not an ordinary company though, it is a cash cow. BellSouth's 2003 profit was \$3.9 billion on \$22.6 billion in revenues. BellSouth is thus arguing that *Computer Inquiry* rules are denying the ILEC less than 1% of its profits.⁴ As such, how seriously should the Commission take any complaints about the costs of complying with *Computer Inquiry* rules? The ILECs should continue to absorb these costs; otherwise they will complete their monopolization of the DSL market. After that occurs, they will surely monopolize VoIP over DSL as well. This will result in less consumer choice and inevitably higher prices on all communications services. This is a small price to order be paid to maintain some semblance of competition in the DSL market.

On the other hand, if the FCC continues to refuse to analyze the most important price issue, this is moot anyway. BellSouth talks about an "upside-down" world. ISPs have been living in just such an upside-down world themselves in the DSL market. All ILECs' retail ISPs are engaged in predatory pricing right now. The net cost of all the inputs that an independent ISP must purchase from its ILEC to sell DSL retail services exceeds the retail price of DSL sold by ILEC-affiliated ISPs. This is not a big secret; Commission staff have been made aware of this repeatedly by ISPs. BellSouth thus

⁴ <http://www.bizjournals.com/triangle/stories/2004/01/19/daily34.html> And, this profit accelerated from "only" \$1.3 billion in 2002.

already has all the pricing power it needs to make life very difficult for ISPs. Its success is apparent in the fact that BellSouth claims control of 90% of the DSL market in its territory. This was not achieved by better service; independent ISPs are routinely rated as having better overall service whether it is customer support or variety of enhanced services offered. This market domination was achieved by simple price pressure, the oldest monopoly trick in the book. Thus far, the Commission has actively ignored this issue under the policy guise of seeking “intermodal” competition. That is bad public policy.

Unwittingly, BellSouth may actually be opening itself to antitrust scrutiny for its pricing behavior. Right now, BellSouth can use the Filed Tariff Doctrine, and hide behind its DSL transport tariff to shield itself from antitrust review. If this portion of the Petition is granted and the tariffs removed, BellSouth may have a lot more to worry about than \$30 million a year in *Computer Inquiry* compliance costs.⁵

B. Elimination of Common Carriage Requirement Premature

This is the real goal of BellSouth’s Petition. BellSouth wants to eliminate independent ISPs as a competitor. The interesting question to ask is why? Independent ISPs actually pay more for DSL transport than do ILEC-affiliated ISPs, usually as a result of volume discounts enjoyed by ILEC ISPs. Then these ISPs must purchase backhaul aggregation circuits from the ILEC as well and spread these costs over far fewer customers. So practically speaking, BellSouth actually makes more in revenue per month from an independent ISP than it does from its own ISP. Yet they want to eliminate the channel.

The real motivation here is to limit competition not only in broadband, but in all other services that can be provided over a broadband network. BellSouth is not really concerned with having the ability to make special deals for ISPs; that would already be possible via contract tariffs. Their real goal is to have the ability to force contract “negotiations” whereby BellSouth can demand ISPs pay even higher rates for DSL transport to ensure that the pesky 10% ISP competition is erased permanently. Then

⁵ SBC Communications should be familiar with this. After removing its tariffed DSL transport, it was sued on antitrust grounds for predatory pricing by four ISPs in California. See *linkLINE et al. v, SBC Communications* currently pending in the central federal district court in California.

BellSouth can return to the standard ILEC playbook—give the ratepayers only what we want to give them, and at the highest possible profit margin.

Moreover, BellSouth and the other ILECs argue that the need for common carriage prevents them from pushing broadband deployments further out into their networks. Current regulatory policy has not restricted ILECs from aggressively deploying broadband. BellSouth has installed DSLAMs in almost every central office in its incumbent footprint, even though it must make DSLAM ports and transport available to ISPs.⁶

Instead, BellSouth wants complete ownership of the customer. The ILECs know that their legacy circuit-switched network has been put in jeopardy by VoIP. Thus far, ISPs have been a small problem and one that can be solved by pricing. After all, independent ISPs once controlled 90% of the dial-up market and now in DSL, that market share has been turned on its head. ISPs would present a bigger potential problem if they started to bundle DSL and VoIP services. After all, VoIP involves the transportation of packets, a skill that ISPs possess in abundance. Understandably, BellSouth does not want to face bundled VoIP competition from ISPs. By allowing BellSouth to destroy the ISP market then, the FCC would be granting ILECs a *de facto* monopoly for residential VoIP services provided over DSL. No amount of explanation can make this into a sound policy decision.

If this Petition is granted, here is exactly what will happen to the residential broadband market as a whole. It will become a duopoly and be immune from pricing pressures or service differentiation. The ILECs will control 100% of the residential DSL market and 100% of the market for those homes that they eventually pass with fiber. The ILECs will offer VoIP only in situations when it does not threaten their legacy circuit-switched telephone revenues. ILECs will paste on some sort of video services such as satellite resale or IP-based video assuming that market actually matures. That will be one competitor in the market.

⁶ http://www.bellsouth.com/broadband/dsl_solutions/discover/coverage/

The other competitor will be the local cable company. They will offer their cable modem broadband and bundle that with VoIP or some packet cable voice services. That will be bundled with their cable platform video services. Cable companies will then be the sole remaining competitor in the market. (This does assume that the customer is fortunate enough to live within 15,000 feet of an ILEC central office and also be within their local cable company's broadband footprint.)

The two will co-exist and eventually, churn will subside as consumers choose one or the other platform for their bundled communications and video services. Pricing will settle at a level acceptable to the duopoly competitors (probably be remarkably similar) and services will be roughly the same. VoIP will be completely co-opted by the duopoly, a robust VoIP market will never develop, and the nascent industry will die a quick death. This will be the end result of the Commission's broadband policy for the residential market.

III. This Petition is Not Ripe for Review

A. Market Has Not Changed to Warrant Forbearance

Forbearance is a mechanism by which the Commission can eliminate regulations that are no longer needed due to changes in the marketplace. BellSouth repeatedly argues that the broadband market has changed so substantially since the establishment of *Computer Inquiry* rules that the rules no longer serve their purpose. The market has decidedly changed. In fact, with BellSouth's ISP's ninety percent market share, the rules arguably need to be strengthened or at least enforced, not eliminated.

B. ILECs Still Have Absolute Control of Last Mile Bottleneck Access for ISPs

In fact, given the ILEC's general dominance in the broadband market, particularly the residential market, the basic premise of the rules is even more true, not less. The *Computer Inquiry* rules are designed to provide a safeguard against ILECs' using their control of the last mile bottleneck to provide an advantage to their affiliated companies, including their in-house ISP. 99.9% of ISPs do not have access to the cable modem

platform, so this bottleneck is still very much in place as far as ISPs are concerned. Again, the current market share percentages tell the story.

C. “Inequality of Regulation” Does Not Require Forbearance

BellSouth also argues that the common carriage requirement should be eliminated because of the inequality of regulation with cable companies. As a preliminary matter, Sonic.net supports open access to all platforms and fundamentally disagrees with the premise that networks will only be built if the builder is guaranteed a monopoly. Sonic.net hopes that the Ninth Circuit’s ruling in the Brand X case is affirmed by the Supreme Court. Given the fact that this case is pending, it would be premature to make any ruling on this Petition. Otherwise, the Commission risks unleashing total chaos in the broadband market. Within a matter of months, everything could be backwards. Cable companies could finally be required to provide real open access rather than today’s strictly limited access⁷ provided at price gouging rates. Meanwhile, ILECs could be freed from providing access to DSL. The Commission should not grant this Petition for this reason alone.

Instead, as soon as the Commission’s other major telecommunications dockets involving VoIP and intercarrier compensation are completed, the Commission should begin a new docket focused on determining the true state of broadband competition. Alternatively, the Commission could revisit the stalled *Broadband Services over Wireline* docket and do a full analysis of the state of broadband and determine which rules, and in which types of markets, rules should be modified.

D. Broadband Alternatives Do Not Yet Exist in Sufficient Quantity

This also raises the issue of alternative broadband options. BellSouth argues that Title II common carriage requirements are unnecessary because cable companies have a large

⁷ The only ISPs that currently have access to the cable platform are EarthLink and a handful of smaller ISPs. As a result of the high, nonnegotiable wholesale prices charged by the cable companies, this “competition” in the cable modem market is illusory. According to EarthLink, cable companies control 97% of the cable modem service market. *See*, Testimony of EarthLink CEO Garry Betty, Senate Commerce Committee, May 12, 2004. Available at http://www.earthlink.net/about/press/pr_0504senateHearing/.

majority market share, and there are plenty of alternative methods available. If this were true, BellSouth would have a valid point. It is not true though. In a large percentage of markets, there simply is no other way for an ISP to provide broadband to the residential market other than DSL. Unlicensed wireless has great promise, but still suffers from basic problems such as the need to maintain unobstructed line of sight. Satellite services are not a viable competitor as they are expensive and suffer extreme latency problems. As a result, satellite is used as a last broadband resort in very rural areas. BellSouth cites DirecTV's Direcway as an example. DirecTV has recently decided to leave the satellite Internet business. BellSouth also mentions broadband over power lines ("BPL") as an alternative. Perhaps someday this will be the case. Today in California, however, not even one trial deployment of BPL exists. BellSouth's Petition thus rests on speculative market developments. Forbearance is a tool to address existing changes in the market. Forbearance should not be used to grant relief because things may change in the future. If/when alternative broadband access is truly widely viable, then this type of Petition should be entertained. Not yet.

IV. Forbearance Prongs Have Not Been Met
A. All Three Prongs Must Be Met

There are three prongs that a Petitioner must show in order for a Petition for forbearance to be granted. The first is that enforcement is not necessary because rates are not discriminatory. The second prong is that enforcement is not necessary for the protection of consumers. The third prong is that forbearance is consistent with the public interest. All of these prongs must be met for the Petition to be granted.

B. Enforcement Necessary Because Discrimination is Ongoing

The first prong requires the Commission to forbear if enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" are "just and unreasonable and not unjustly and unreasonably discriminatory."⁸ As discussed above, ILECs, including BellSouth have been engaging in predatory pricing with their DSL transport offering for years now. As long as it costs an ISP more to buy the inputs for

⁸ 47 U.S.C. § 160 (a).

DSL services from an ILEC than the cost if that ILEC's ISP DSL retail price, this Petition cannot be granted. Such a pricing policy is unjust, unreasonable, and discriminatory on its face.

There is also some doubt that the FCC understands the state of the ISP industry well enough to determine whether this prong has been met. As an example, in the first Triennial Review order released in August 2004, the FCC cites Census Bureau information on ISPs from 1997.⁹ If the FCC intends to review a Petition that will decide whether ISPs are allowed to economically sell DSL, the FCC must do a thorough analysis of the ISP market. Then, after the FCC has gathered the necessary information, the Commission will be in a position to make a reasoned judgment on the merits of this Petition.

C. Consumers Do Need the Commission's Protection in this Case

The second prong requires the FCC to forbear if enforcement "is not necessary for the protection of consumers."¹⁰ In order to determine whether this prong is met, the Commission must determine the true state of the ISP industry and the DSL market. The FCC routinely surveys the broadband market, but does not examine the extent to which consumers are served by independent ISPs. For example, in the Commission's Fourth Report on Broadband Deployment,¹¹ the Commission found that DSL serves roughly 15% of the broadband market. Of the 28.2 million lines of high speed service, DSL served 34 percent, or roughly 9.6 million. Of that number, we can assume based on statements from the ILECs and CLEC DSL providers that independent ISPs serve hundreds of thousands of DSL customers. Although BellSouth may argue that this is a relatively small number, these customers will surely be hurt if ISPs' right to use ILEC DSL transport is diminished.

⁹ *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, Released August 20, 2004.

¹⁰ 47 U.S.C. § 160 (a).

¹¹ *Availability of Advanced Telecommunications Capability in the United States- Fourth Report to Congress*, FCC 04-208, Released September 9, 2004. ("Fourth Report on Broadband Deployment")

As was noted above as well, consumers do not have the degree of choice in broadband providers as BellSouth argues. Consumers have not subscribed in large numbers to satellite because the service is expensive and unreliable. Wireless ISPs are doing their best using unlicensed spectrum to provide service to thousands of customers across the US. With a combination of current equipment limitations and terrain issues though, most WISPs are only able to serve a distinct subset of customers. As far as BPL is concerned, this would be great if it was actually in wide scale deployment. That is simply not the case yet. The FCC must consider how consumers using an independent ISP's DSL will be harmed. Failure to do so opens such a decision to a court challenge and would add yet further instability to the telecommunications industry.

The facilities-based competition camp may argue that if there is to be DSL competition, it should come from competitive local exchange carriers. This would be a realistic question to ask if line-sharing was still available as an unbundled network element. For reasons that are still hard to fathom, the FCC thought otherwise and eliminated this requirement. Given this reality, and the limited alternatives, most consumers today only have a choice between DSL and cable modem service. If common carriage is eliminated, that will create a duopoly. Two choices for broadband are not enough to keep prices low and spur continued innovations.

In the Fourth Report on Broadband Deployment, the Commission found that cable had extended its lead over DSL from 56 to 18 percent, to 75 to 15 percent. Why is that the case? "Regulatory uncertainty?" Because DSL is subject to common carriage transport? It is completely illogical for BellSouth to claim that DSL market share is suffering because ILECs must serve an additional sales channel, ISPs. Arguably, given the fact that independent ISPs serve millions of DSL customers, if common carriage was eliminated, DSL would lose further market share as these customers would be forced to seek new service. One must assume that given the ILECs' complete dominance within the DSL market and massive marketing power, if a customer now chooses to use an independent ISP for service, they are doing so specifically because they do not want their Internet connectivity to come from the ILEC's ISP.

Customers perceive that cable service can be installed more quickly and with less hassle. Customers can get higher speeds with cable modem service. Cable service is considered to be more stable.¹² Consumers choose cable modem service even though it is higher priced, generally, than DSL service. In the mid-1990s, the ILECs made a strategic business decision to protect their ISDN and T1 profits instead of aggressively rolling out DSL in the mid-1990s. These are the reasons why DSL is so far behind cable, not because of any regulatory inequality.

BellSouth's Petition then essentially asks for a bail-out. ILECs would rather try to take whichever customers they can from independent ISPs instead of improving their network and customer service to lure customers from cable.

Consumers should not be forced to accept poor ILEC DSL service. If the Commission grants this Petition and essentially decides that only ILECs should be able to provide DSL, hundreds of thousands of consumers will be forced into purchasing a service they have already decided they do not want.

D. Petition Seeks to Eliminate Meaningful Choice for Consumers

The final prong requires that forbearance be in "the public interest."¹³ Granting this Petition would be equivalent to agreeing with the consistent ILEC party line that less competition is good for America. And in fact, as the argument goes, if we are not protected from competition, we will refuse to invest in broadband deployment. By what contortion of logic can it ever really be in the public interest to kill competition?

The Commission must also consider this Petition's effect on voice over Internet protocol ("VoIP"). This is the prize. VoIP requires broadband in order to function properly. If the only broadband options into a residence are either cable or ILEC DSL, then a consumer will have a choice between cable VoIP or ILEC VoIP. The great revolution of VoIP will never occur. It is possible that VoIP will quickly be commoditized like all

¹² This is not surprising. ISPs usually avoid ILECs for their connection to the Internet because of unreliability. Instead, they use competitive carriers. ISPs are, however, forced to use ILEC networks for DSL traffic aggregation—bringing the traffic from the customers to the ISP's equipment.

¹³ 47 U.S.C. § 160 (a).

voice services have in the recent past. It will make far more sense for a consumer to take the bundled VoIP from the cable company or the ILEC. It should also be noted that there are no rules that would prevent a cable company or ILEC from prioritizing its VoIP traffic over another provider's.

Given past history in the broadband market, ILECs will likely be slow to fully embrace VoIP so as to protect their traditional circuit-switched telephony revenues. This is precisely what happened in the DSL market as the ILECs ignored DSL for years to protect their highly profitable ISDN and T1 lines. Only after DSL was pushed by ISPs and CLECs did the ILECs turn to the technology and roll-out DSL on a wide scale. Now they dominate the market. The same will occur to VoIP if the Commission is not very careful with its policy decisions. For this reason alone, this Petition should be denied.

V. The Petition Should be Denied in its Entirety

The FCC must acknowledge that granting this Petition will destroy the companies that created the Internet market and leave consumers with a choice between only two services for the foreseeable future. Give the current sad state of residential voice competition, this is bad policy. ISPs may be the only entities in any position to provide competition to the duopoly in an IP world. They have customers and local brand recognition. They understand how to effectively move packets on their networks. By participating in the destruction of the independent ISP industry, the FCC will be missing the sole remaining chance for real, facilities-based competition to arise in the residential marketplace.

At a minimum, the FCC is required to analyze the effect this would have on the ISP industry. Yet, the FCC continues to use seven year old data in the number of ISPs and has no idea what ISPs do, how they do it, and how many are doing it. Before the Commission grants something like this, it must do a market by market analysis of whether consumers really have a choice in broadband providers. Vague market generalizations are not sufficient. The Petition should be denied in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kristopher E. Twomey". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kristopher E. Twomey
Counsel to Sonic.net